

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

K.M. BREIMON,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C23-5763-SKV

ORDER AFFIRMING THE
COMMISSIONER'S DECISION

Plaintiff seeks review of the denial of his application for Supplemental Security Income (SSI).¹ Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court **AFFIRMS** the Commissioner's final decision and **DISMISSES** the case with prejudice.

BACKGROUND

Plaintiff was born in 1972, AR 275, has a GED, AR 313, and has no employment history, AR 312. On March 26, 2019, Plaintiff applied for benefits, alleging disability as of March 30, 2019. AR 17, 276. Plaintiff's applications were denied initially and on reconsideration, and

¹ Plaintiff also applied for Disability Insurance Benefits (DIB), AR 289–90; however, it was determined that he had not worked long enough to qualify for such benefits, *see* AR 308. Plaintiff does not challenge this finding.

Plaintiff requested a hearing. AR 91–99, 103–09, 110–12. After the ALJ conducted a hearing on May 12, 2022, the ALJ issued a decision finding Plaintiff not disabled. AR 14–35.

THE ALJ’S DECISION

Utilizing the five-step disability evaluation process,² the ALJ found:

Step one: Plaintiff has not engaged in substantial gainful activity since March 26, 2019, the application date.

Step two: Plaintiff has the following severe impairments: anxiety, depression, attention-deficit hyperactivity disorder, trauma disorder, and specific learning disorder.

Step three: These impairments do not meet or equal the requirements of a listed impairment.³

Residual Functional Capacity: Plaintiff can perform a full range of work at all exertional levels but with the following nonexertional limitations: he is limited to simple and detailed work that can be learned in 30 days or less. He can have occasional contact with coworkers and no public contact.

Step four: Plaintiff’s past relevant work has been expedited because the record does not contain sufficient evidence about such work to make a finding at step four.

Step five: As there are jobs that exist in significant numbers in the national economy that Plaintiff can perform, Plaintiff is not disabled.

AR 19–29.

The Appeals Council denied Plaintiff’s request for review, making the ALJ’s decision the Commissioner’s final decision. AR 1–6. Plaintiff appealed the final decision of the Commissioner to this Court. Dkt. 1.

LEGAL STANDARDS

Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of social security benefits when the ALJ’s findings are based on harmful legal error or not supported by

² 20 C.F.R. §§ 404.1520, 416.920.

³ 20 C.F.R. Part 404, Subpart P., App. 1.

substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a general principle, an ALJ’s error may be deemed harmless where it is “inconsequential to the ultimate nondisability determination.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (cited sources omitted). The Court looks to “the record as a whole to determine whether the error alters the outcome of the case.” *Id.*

Substantial evidence is “more than a mere scintilla. It means - and means only - such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (cleaned up); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for evaluating symptom testimony, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that must be upheld. *Id.*

DISCUSSION

Plaintiff argues the ALJ erred by (1) improperly rejecting the medical opinions of Dr. David Morgan, Ph.D., and Dr. Janis Lewis, Ph.D.; and (2) improperly failing to find Plaintiff’s substance use severe or perform a proper Drug Addiction and Alcoholism (DAA) analysis. Dkt. 8 at 1. The Commissioner argues the ALJ’s decision is free of harmful legal error, supported by substantial evidence, and should be affirmed.

1 **A. The ALJ Did Not Err in Assessing Medical Opinion Evidence.**

2 In finding Plaintiff not disabled, the ALJ considered opinions from Department of Social
3 and Health Services (DSHS) psychologists, Dr. David Morgan, Ph.D., and Dr. Janis Lewis,
4 Ph.D. AR 26–27 (citing AR 364–68; 724–26).

5 Following a psychological evaluation of Plaintiff and a review of Plaintiff’s DSHS
6 records, Dr. Morgan diagnosed Plaintiff with a panic disorder and antisocial personality disorder,
7 rated Plaintiff’s overall severity as “moderate,” and concluded that Plaintiff would be impaired
8 by psychological symptoms for eight months. AR 365–66. Dr. Morgan found moderate to
9 marked symptoms of anxiety and antisocial personality disorder occurring daily in Plaintiff, AR
10 365, as well as moderate limitations in Plaintiff’s ability to understand, remember, and persist in
11 tasks by following detailed instructions; learn new tasks; perform routine tasks without special
12 supervision; make simple work-related decisions; be aware of normal hazards and take
13 appropriate precautions; ask simple questions or request assistance; and set realistic goals and
14 plan independently, AR 366. Dr. Morgan found marked limitations in Plaintiff’s ability to
15 perform activities within a schedule, maintain regular attendance, and be punctual within
16 customary tolerances; adapt to changes in a routine work setting; communicate and perform
17 effectively in a work setting; maintain appropriate behavior in a work setting; and complete a
18 normal workday and workweek without interruptions from psychologically based symptoms.
19 AR 366. Notably, Dr. Morgan indicated that Plaintiff did not “report any history of substance
20 abuse or chemical dependency.” AR 365.

21 Dr. Lewis reviewed Dr. Morgan’s opinion and certain medical evidence to reach a
22 disability determination. AR 724–26. Dr. Lewis found the same moderate and marked
23 limitations as Dr. Morgan, AR 725, but determined that the duration of Plaintiff’s symptoms

1 would last twelve months, as opposed to eight, AR 724. Dr. Lewis rated Plaintiff's overall
2 severity as "3" and diagnosed Plaintiff with panic disorder, attention-deficit hyperactivity
3 disorder, major depressive disorder, antisocial personality disorder, and posttraumatic stress
4 disorder. AR 726. Dr. Lewis failed to complete the portion of the relevant DSHS questionnaire
5 asking whether Dr. Lewis's diagnoses, severity rating, and functional limitation findings were
6 supported by available objective medical evidence. *See* AR 724.

7 The ALJ concluded that Dr. Lewis's opinion was unpersuasive, as its finding of marked
8 limitations was inconsistent with the longitudinal record and Dr. Lewis failed to provide support
9 for the opinion. AR 26–27. Per the ALJ, Plaintiff's "symptoms improved with medication" and
10 worsened when Plaintiff stopped "taking his medications, use[d] drugs, and experience[d] the
11 effects of withdrawal from drugs and medication." AR 27. The ALJ similarly found Dr.
12 Morgan's opinion unpersuasive to the extent it concluded Plaintiff suffered from marked
13 limitations, as this finding was not supported by the record, which demonstrated that
14 "medications temper[ed] his symptoms." AR 27. However, the ALJ found Dr. Morgan's
15 opinion persuasive to the extent it supported a finding of moderate severity of symptoms, as the
16 record showed "some deficiencies in concentration, memory, interacting with others, and
17 [Plaintiff] managing himself" AR 27. The ALJ noted that because Dr. Morgan was
18 unaware of Plaintiff's drug use, he was not "in a position to assess the claimant's functional
19 capacity with precision." AR 27.

20 Under regulations applicable to this case, the ALJ is required to articulate the
21 persuasiveness of each medical opinion, specifically with respect to whether the opinions are
22 supported and consistent with the record. 20 C.F.R. § 404.1520c(a)–(c). An ALJ's consistency
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1 and supportability findings must be supported by substantial evidence. *See Woods v. Kijakazi*,
2 32 F.4th 785, 792 (9th Cir. 2022).

3 Plaintiff does not challenge the ALJ's supportability and consistency findings with
4 respect to Dr. Morgan's or Dr. Lewis's opinions.⁴ Instead, Plaintiff argues that the ALJ failed to
5 notice that both opinions offered the exact same limitations and differed only in their conclusion
6 about the duration of those limitations, meaning the ALJ's discussion was inconsistent between
7 the two opinions. Dkt. 8 at 6. Contrary to Plaintiff's contentions, however, the opinions differed
8 in more ways than just the stated duration of Plaintiff's symptoms. Dr. Lewis diagnosed Plaintiff
9 with several conditions that Dr. Morgan did not, including attention-deficit hyperactivity
10 disorder, major depressive disorder, and posttraumatic stress disorder. *See* AR 365, 726. And
11 even if the ALJ's discussion was inconsistent between the two opinions, Plaintiff has failed to
12 demonstrate harmful error; the ALJ acknowledged the persuasiveness of Dr. Morgan's moderate
13 limitation findings, AR 27, and considered them in formulating the RFC, *see* AR 21–27. As
14 Plaintiff acknowledges, those same moderate limitations were noted by Dr. Lewis. Plaintiff fails
15 to demonstrate that the ALJ's disability determination would have differed had those limitations
16 been attributed to both Dr. Morgan and Dr. Lewis, as opposed to just Dr. Morgan.

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19 ⁴ Plaintiff, on reply, challenges the ALJ's supportability findings with respect to both opinions by
20 arguing (1) the ALJ erred by finding Dr. Morgan's opinion unsupported because, in so finding, the ALJ
21 relied only on Plaintiff's failure to report his substance abuse; and (2) the ALJ erred in finding Dr. Lewis's
22 opinion unsupported because the opinion was supported by "the underlying examination performed by Dr.
23 Morgan." *See* Dkt. 11 at 2–3. "[A]rguments not raised by a party in an opening brief are waived." *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) (citing *Eberle v. Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990)). Regardless, Plaintiff's arguments fail. As discussed *infra*, the ALJ did not err by relying on Plaintiff's failure to report his substance abuse to Dr. Morgan when discounting the opinion. And even assuming the ALJ erred in assessing the supportability of Dr. Lewis's opinion, because Plaintiff does not challenge the ALJ's consistency finding with respect to that opinion, any such error would be harmless. *See Woods*, 32 F.4th at 792–94 & n.4 (consistency and supportability constitute two distinct factors that should be treated separately).

1 Plaintiff further argues that the ALJ erred in relying on Plaintiff's substance use when
2 rejecting Dr. Morgan's and Dr. Lewis's opinions because the ALJ herself determined that
3 Plaintiff's substance use caused his impairments to worsen, Dkt. 8 at 8, meaning the ALJ should
4 have found the substance use to be a medically determinable impairment that impacted
5 Plaintiff's functioning, *id.* at 6. But the ALJ did not reject Dr. Morgan's opinion because of
6 Plaintiff's substance use. The ALJ rejected the opinion because Plaintiff failed to report his
7 substance use, which reduced the doctor's ability to adequately assess Plaintiff. Given that Dr.
8 Morgan relied on Plaintiff's inaccurate self-reporting of his substance use when opining on the
9 severity of Plaintiff's mental impairments, the ALJ properly found the opinion unpersuasive.
10 *See Georgina R. v. Comm'r of Soc. Sec.*, No. C20-5730-MLP, 2021 WL 1531139, at *3 (W.D.
11 Wash. Apr. 19, 2021) (the ALJ properly found the examining psychologists' opinions
12 unpersuasive because they relied upon the claimant's inaccurate self-reporting of his alcohol
13 use); *see also Oviatt v. Comm'r of Soc. Sec.*, 303 F. App'x 519, 522 (9th Cir. 2008) (the ALJ
14 properly rejected medical opinions under the previous medical evidence regulations because they
15 relied upon inaccurate information about the claimant's substance abuse).

16 The ALJ likewise did not reject Dr. Lewis's opinion solely—or even primarily—because
17 of Plaintiff's substance use. Instead, the ALJ rejected it because it was unsupported and
18 inconsistent; Plaintiff's "symptoms improved with medication" and worsened when Plaintiff
19 stopped "taking his medications, use[d] drugs, and experience[d] the effects of withdrawal from
20 drugs and medication." AR 27. The fact that Plaintiff's symptoms improved while he was
21 compliant with treatment and worsened when he was not was relevant to the ALJ's evaluation of
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1 the persuasiveness of Dr. Lewis’s opinion.⁵ See *Allen v. Kijakazi*, No. 22-35056, 2023 WL
2 2728857, at *1 (9th Cir. Mar. 31, 2023) (the ALJ appropriately found unpersuasive an opinion
3 about the claimant’s significant restrictions because it was inconsistent with objective medical
4 evidence showing mild abnormalities and improvement with treatment).

5 Finally, Plaintiff argues that the ALJ erred in finding the opinions’ moderate limitations
6 persuasive, but offering only two limitations in the RFC: a limit to simple and detailed work that
7 can be learned in thirty days or less, and a limit to occasional contact with coworkers and no
8 public contact. Dkt. 8 at 6 (citing AR 21, 27). Both opinions concluded Plaintiff had moderate
9 limitations in the ability to understand, remember, and persist in tasks by following detailed
10 instructions; learn new tasks; perform routine tasks without special supervision; make simple
11 work-related decisions; be aware of normal hazards and take appropriate precautions; ask simple
12 questions or request assistance; and set realistic goals and plan independently. AR 366, 725.
13 The ALJ found these moderate limitations persuasive to the extent they were consistent with the
14 record, which showed “some deficiencies in concentration, memory, interacting with others, and
15 [Plaintiff] managing himself.” AR 27. The RFC limitations articulated by the ALJ were
16 consistent with this assessment. Specifically, the ALJ limited Plaintiff to working in an
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18 ⁵ It is true that, in the context of mental health issues, “[c]ycles of improvement and debilitating
19 symptoms are a common occurrence, and in such circumstances it is error for an ALJ to pick out a few
20 isolated instances of improvement over a period of months or years and to treat them as a basis for
21 concluding a claimant is capable of working.” *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014)
22 (citing *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001)) (“[The treating physician’s] statements
23 must be read in context of the overall diagnostic picture he draws. That a person who suffers from severe
panic attacks, anxiety, and depression makes some improvement does not mean that the person’s
impairments no longer seriously affect her ability to function in a workplace.”)). Reports of improvement
must instead be interpreted “with an awareness that improved functioning while being treated and while
limiting environmental stressors does not always mean that a claimant can function effectively in a
workplace.” *Id.* (citing *Hutsell v. Massanari*, 259 F.3d 707, 712 (8th Cir. 2001)). Plaintiff, however, does
not challenge the fact that the ALJ relied on Plaintiff’s symptoms improving with treatment when finding
Plaintiff not disabled; he challenges only the ALJ’s reliance on Plaintiff’s substance use when rejecting Dr.
Morgan’s and Dr. Lewis’s opinions.

1 environment that has no public contact and only occasional contact with coworkers, and to
2 performing simple and detailed work that can be learned in thirty days or less. AR 21. These
3 limitations track both doctors' finding that Plaintiff is moderately impaired in his ability to learn
4 and perform new or complex tasks, as well as the record evidence suggesting Plaintiff had
5 deficiencies in concentration, memory, interacting with others, and the ability to manage himself.
6 *See Kitchen v. Kijakazi*, 82 F.4th 732, 740 (9th Cir. 2023) (finding that the ALJ's RFC
7 adequately "track[ed]" the physician's opinion regarding the claimant's impairments); *Turner v.*
8 *Comm'r*, 613 F.3d 1217, 1223 (9th Cir. 2010) (approving of the ALJ's incorporation into the
9 RFC of limitations found in a doctor's opinion when the ALJ ultimately rejected that doctor's
10 finding of disability). Plaintiff does not articulate a basis for finding that the ALJ's assessment
11 was inconsistent with the moderate limitations identified by the doctors or with those identified
12 by the ALJ in the record as a whole.

13 By providing that the marked limitations noted by Dr. Morgan and Dr. Lewis were not
14 supported by either doctor and were inconsistent with the longitudinal record, AR 26–27, the
15 ALJ properly addressed the supportability and consistency of both opinions. As such, the ALJ
16 did not err in discounting them.

17 **B. The ALJ Did Not Err by Failing to Find Plaintiff's Substance Use Severe or**
18 **Perform a DAA Analysis.**

19 Plaintiff argues the ALJ erred by failing to include Plaintiff's substance use as a severe
20 impairment at step two because, as acknowledged by the ALJ, Plaintiff's substance use caused
21 his symptoms to worsen. Dkt. 8 at 8. Plaintiff further contends that, because the ALJ should
22 have concluded Plaintiff's substance use was a severe impairment, she likewise should have
23 performed a DAA analysis. *Id.*

1 At step two of the sequential evaluation, the claimant has the burden of showing that he
2 has at least one impairment that is both medically determinable and severe. *Tidwell v. Apfel*, 161
3 F.3d 599, 601 (9th Cir. 1999); 20 C.F.R. § 416.920(a)(4)(ii). An ALJ will find that a claimant
4 has a medically determinable impairment only if the record includes “medically acceptable
5 clinical and laboratory diagnostic techniques.” 20 C.F.R. § 416.921. Further, an ALJ will only
6 find an impairment to be “severe” if it “significantly limits [a claimant’s] physical or mental
7 ability to do basic work activities.” 20 C.F.R. § 416.920(c).

8 Here, the ALJ determined that Plaintiff’s anxiety, depression, attention-deficit
9 hyperactivity disorder, posttraumatic stress disorder, and learning disorder were severe at step
10 two. AR 20. She therefore resolved step two in Plaintiff’s favor and continued with the
11 sequential evaluation process. AR 20–28.

12 Plaintiff argues that the ALJ harmfully erred by failing to find Plaintiff’s substance use
13 severe at step two because her own analysis indicated it was severe and, had the ALJ so found,
14 she would have included additional restrictions in the RFC. Dkt. 8 at 8; Dkt. 11 at 4–5. It does
15 not follow, however, that a finding of severity would have led to the inclusion of additional
16 restrictions in the RFC. “Step two is merely a threshold determination meant to screen out weak
17 claims.” *Buck v. Berryhill*, 869 F.3d 1040, 1048 (9th Cir. 2017) (citing *Bowen v. Yuckert*, 482
18 U.S. 137, 146–47 (1987)). “It is not meant to identify the impairments that should be taken into
19 account when determining the RFC.” *Id.* at 1048–49. Instead, in assessing the RFC, “the
20 adjudicator must consider limitations and restrictions imposed by all of an individual’s
21 impairments, even those that are not ‘severe.’” *Id.* at 1049 (citing SSR 96-8p). “The RFC
22 therefore *should* be exactly the same regardless of whether certain impairments are considered
23 ‘severe’ or not.” *Id.* (emphasis in original).

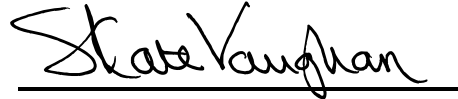
1 Here, the ALJ properly took all of Plaintiff's impairments, including his substance use,
2 into account when formulating the RFC. *See, e.g.*, AR 26 (discussing, in the context of the RFC
3 formulation, a doctor's opinion finding that Plaintiff "uses intravenous heroin,
4 methamphetamine, and daily marijuana, which cause acute intoxication and withdrawal" which
5 the doctor determined caused limitations in Plaintiff's ability to perform basic work activities;
6 finding that doctor's opinion not persuasive because it indicated Plaintiff's "limitations are
7 caused by substance abuse rather than a mental health impairment" when "the records show
8 ongoing symptoms when not using, such as when [Plaintiff] is incarcerated."). Moreover,
9 because step two was decided in Plaintiff's favor, he cannot demonstrate prejudice resulting from
10 the ALJ's failure to include his substance use as a severe impairment. *Buck*, 869 F.3d at 1049
11 (citing *Molina*, 674 F.3d at 1115). Any alleged error in the ALJ's failure to do so is harmless
12 and cannot be the basis for remand. *Id.*

13 Finally, Plaintiff argues that because the ALJ should have found Plaintiff's substance use
14 to be a severe impairment, she should have performed a DAA "materiality" analysis. Dkt. 8 at 8.
15 But contrary to Plaintiff's contentions, a DAA "materiality" analysis was not necessary under the
16 circumstances. The ALJ would only have been required to analyze whether Plaintiff's substance
17 use was material to his disability if the ALJ first determined that Plaintiff was disabled. *See*
18 *Parra v. Astrue*, 481 F.3d 742, 746–48 (9th Cir. 2007); *Bustamante v. Massanari*, 262 F.3d 949,
19 954–55 (9th Cir. 2001); SSR 13-2p. Here, the ALJ considered all of Plaintiff's impairments,
20 including his substance use, and found him not disabled, AR 21–29, meaning no further analysis
21 of Plaintiff's substance use was required, *Parra*, 481 F.3d at 746–48; *Bustamante*, 262 F.3d at
22 955; SSR 13-2p.

CONCLUSION

For the reasons set forth above, the Commissioner's final decision is **AFFIRMED** and this case is **DISMISSED** with prejudice.

Dated this 18th day of March, 2024.

A handwritten signature in black ink, reading "S. Kate Vaughan", is positioned above a solid horizontal line.

S. KATE VAUGHAN
United States Magistrate Judge